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DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Suggestions for the final review

Note by the Secretariat

CONTENTS

	Paragraphs	Page
INTRODUCTION	1 - 2	3
I. TIME-PERIODS	3 - 36	3
A. Definition and length of execution period	4 - 15	3
1. Definition of "execution period", article 2(k)	4 - 6	3
2. Execution period of payment order accepted in normal course	7 - 9	4
3. Execution period for payment order that is deemed accepted	10 - 11	4
4. Execution period for payment order that contains instructions as to time of execution	12 - 15	5
B. Application of article 10 to the beneficiary's bank	16 - 20	6
C. Interpretation of term "banking day"	21 - 23	7

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	Paragraphs	Page
D. Time for giving notice of rejection and consequences of failing to do so	24 - 31	8
1. Receiving bank other than the beneficiary's bank	24 - 30	8
2. Beneficiary's bank	31	8
E. Time as of when value must be given	32 - 35	9
F. Proposed redrafted article 10(1), (1 bis), and (1 ter)	36	10
II. OTHER MATTERS	37 - 58	11
A. Branches and separate offices of a bank	37 - 38	11
B. Definition of "credit transfer", article 2(a)	39 - 42	11
C. Definition of "execution", article 2(1)	43 - 44	12
D. Definition of "interest", article 2(n)	45	12
E. Obligations of sender, article 4	46 - 50	12
1. Article 4(2)	46	12
2. Article 4(3)	47	13
3. Article 4(5)	48 - 50	13
F. Payment to receiving bank, article 5	51 - 55	13
1. "For the purposes of this law"	51	13
2. Time when availability of credit leads to payment, article 5(b)(i) and (ii)	52 - 54	14
3. Time when credit to an account is used, article 5(b)(i) and (ii)	55	14
G. Revocation, article 11	56 - 57	15
1. Paragraphs (1) and (2)	56	
2. Paragraph (6)	57	15
H. Duty to assist, article 14	58	15

INTRODUCTION

1. At its twenty-fourth session the Commission considered fifteen of the eighteen articles of the draft Model Law on International Credit Transfers that had been prepared by the Working Group on International Payments. In preparation for the completion of the consideration of the draft Model Law by the Commission, the Secretariat has reviewed the articles already adopted in the Model Law to identify potential problems of a technical variety. In many cases the problems that have been identified are of a drafting nature. In other cases they are of a substantive nature, at times involving fundamental policy considerations.

2. The most important problems that the Secretariat has identified relate to the various time-periods established by the Model Law. In order to make clear the issues involved, Part I of this note sets out the scheme for the time-periods in some detail and refers to problems with that scheme that the Commission may wish to consider; in some cases solutions for those problems are suggested. Other problems identified by the Secretariat are set forth in Part II of this note.

I. TIME-PERIODS

3. The Model Law establishes time-periods during which the receiving bank must perform a certain number of actions. Those time-periods are inter-related, which in many cases makes them difficult to understand. The basic time-period from which other time-periods must be calculated is the "execution period".

A. Definition and length of execution period

1. Definition of "execution period", article 2(k)

4. As adopted by the Commission at its twenty-fourth session, article 2(k) provides:

> "'Execution period' means the period of one or two days beginning on the first day that a payment order may be executed under article 10(1) and ending on the last day on which it may be executed under that article, on the assumption that it is accepted on receipt."

5. The Commission may wish to attempt to find a clearer formulation. For example, the execution period might be said to end "at the end of" the last day on which it may be executed. Secondly, the meaning of the last phrase, "on the assumption that it is accepted on receipt", may not be clear (see below, paragraphs 11, and 24 to 28).

6. The definition, like the obligation on which it depends contained in article 10(1), encompasses three separate fact situations dealt with below: (i) the payment order contains no indication as to when it is to be executed and it is accepted in normal course, (ii) the payment order is deemed to be accepted under article 6(2)(e) or 8(1)(h), and (iii) the payment order contains an indication as to when it is to be executed.

2. Execution period of payment order accepted in normal course

7. Article 10(1) provides that a payment order that contains no indication as to when it is to be executed must be executed not later than the banking day after the banking day it is received. Thus, the normal execution period is two banking days in length.

8. Although the current text was adopted by the Commission at its twenty-fourth session, the rule that the normal execution period would begin on receipt of the payment order by the receiving bank dates from the earliest drafts of the Model Law. The rule in article 10(1) does not specifically take account of the fact that under article 7 a receiving bank is obligated to execute the payment order only if it has accepted the order. The Working Group was of the view that it was understood that article 10(1) provided the period of time during which execution had to occur only if the payment order was accepted (A/CN.9/346, comment 6 to article 10), a view that was apparently shared by the Commission at the twenty-fourth session. The Commission may wish to make explicit that interpretation of the text (see suggested redraft, below, paragraph 36).

9. Length of execution period after acceptance pursuant to article 6(2)(a) to (d). Since the execution period under article 10(1) runs from the time of receipt and not the time of acceptance, the period of time for execution subsequent to acceptance varies depending on the way in which the payment order is accepted. There are three basic situations. First, since article 6(2)(c) provides that a receiving bank that is not the beneficiary's bank accepts a payment order by executing it, there would be no execution period after acceptance and none would be needed. Second, where the payment order is accepted upon receipt under article 6(2)(a), i.e., where there has been a prior agreement that the receiving bank would "execute payment orders from the sender upon receipt", the bank would have up to two banking days after acceptance to execute the payment order if the normal rule of article 10(1) is held to apply. For further discussion of this example and a suggestion that a different rule should be understood to apply, see below, paragraph 15. Third, if before the end of the banking day after receipt acceptance occurs by one of the voluntary acts set out in article 6(2)(b) or (d), the execution period expires at the end of the banking day after receipt. Therefore, the receiving bank will have an execution period after acceptance that will range between a maximum of two full banking days and a minimum of minutes.

3. Execution period for payment order that is deemed accepted

10. The problems in determining when a payment order is deemed to be accepted under article 6(2)(e) (or article 8(1)(h) in the case of the beneficiary's bank) are discussed below, paragraphs 24 to 28. At this point it is sufficient to note that articles 6(3) and 8(2) provide that a receiving bank that has received payment for the payment order must either accept the order or give notice of rejection by the end of the second banking day after receipt. If it fails to do either one, articles 6(2)(e) and 8(1)(h) provide that the payment order is deemed to be accepted at that time.

11. Since article 10(1) provides that the payment order must be executed

by the end of the first banking day after its receipt, at the moment of deemed acceptance the receiving bank is already one day late in fulfilment of its obligation to execute the order. That conclusion, which is the consequence of a literal application of article 10(1), seems to have been intended by the Commission. Any doubts are eliminated by the last clause of the current definition of "execution period" in article 2(k), i.e., "on the assumption that it is accepted on receipt." That clause was added by the drafting group at the twenty-fourth session to overcome the problem that the deemed acceptance rule in articles 6(2)(e) and 8(1)(h) depends on the passage of the execution period but the application of the execution period in article 10(1) depends on the acceptance of the payment order by the receiving bank. The difficulties in regard to the length of the execution period in the case of deemed acceptance are compounded when the sender pays for the payment order after the end of the second banking day following the banking day the receiving bank receives the payment order (for a more complete discussion see below, paragraphs 24 and 25).

4. Execution period for payment order that contains instructions as to time of execution

12. Article 10(1)(a) provides that a payment order that contains an instruction that the order is to be executed on a date later than the banking day after the banking day of receipt is to be executed on the indicated date. From a literal application of the text, an instruction that the payment order is to be executed on the day of receipt would be of no effect; the execution period would end at the end of the banking day after receipt. That consequence is the unintended result of the change in the normal execution period from a same day rule, as it was in the draft prepared by the Working Group, to a next day rule, as in the current text adopted by the Commission at the twenty-fourth session. The change would appear to have been made without an appropriate adjustment in the text of article 10(1)(a). Such an adjustment is suggested in the redraft of article 10(1)(a) (see below, paragraph 36).

13. Article 10(1)(b) provides a somewhat similar rule to that provided in article 10(1)(a) but in respect of the situation where the order specifies a date when the funds are to be placed at the disposal of the beneficiary. However, application of the current text of article 10(1)(b) to a particular payment order could lead to a requirement of execution on the day of receipt and no change in the text seems necessary.

14. Even if article 10(1)(a) is modified as suggested in paragraph 36, or in the case of the current text of article 10(1)(b), the receiving bank's obligation would not appear to be clear when the application of the provision would lead to an execution period that terminated prior to the day of receipt of the payment order. Such a situation might easily arise. Of course, the receiving bank could and should reject the payment order or ask for further instructions. If it does nothing, the current text might be interpreted to say that the receiving bank has received "a payment order [that] cannot be executed because of insufficient data" and that the bank has a notification obligation under article 7(4) or 9(2), or the current text might be interpreted to say that failure to reject the payment order would lead to deemed acceptance of it. In the view of the Secretariat the former interpretation is preferable since the receiving bank does not know the reason

for the execution date, and the originator may not wish the order to be accepted or executed at all when it cannot be executed on the desired date. The Commission may wish to consider whether any amendment to the current text would be desirable in order to make clear what the appropriate interpretation should be.

15. Sender and receiving bank have agreed that the bank will execute payment orders from the sender upon receipt. Articles 6(2)(a) and 8(1)(a) provide that, if the sender and the receiving bank have agreed that the bank will execute payment orders from the sender upon receipt, the payment order is accepted upon receipt. Those provisions were drafted with the specific situation of the Clearing House Automated Payments Systems (CHAPS) in mind, though they are expected to be applicable to a large number of bilateral and multilateral agreements among banks and between banks and their customers. However, articles 6(2)(a) and 8(1)(a) govern only the acceptance of the payment order, not the requirement to execute it, and article 10(1) does not anticipate this situation. For a payment order to be subject to an execution period other than the normal two days ending on the banking day after receipt, the payment order itself would have to say so. While it is true that an agreement such as the one under discussion could be understood to be an agreement under article 3 that varied the rights and obligations of parties to a credit transfer, it would be preferable to anticipate this particular type of agreement in article 10(1) as well (see the proposed text in paragraph 36).

B. Application of article 10 to the beneficiary's bank

16. It would appear not to be clear whether article 10 is intended to apply in general to the beneficiary's bank. In favour of applying article 10 generally to the beneficiary's bank is the fact that the definition of "receiving bank" in article 2(g) includes a beneficiary's bank. Therefore, unless an individual paragraph in article 10 explicitly excluded its application to the beneficiary's bank, it would automatically apply.

17. It appears that two specific provisions of article 10 were expected to apply to the beneficiary's bank. First, article 8(2) requires a beneficiary's bank that has received payment for a payment order but that does not accept it "to give notice of rejection no later than on the banking day following the end of the execution period". Since the execution period is defined in article 2(k) in terms of the time-limits in article 10(1), article 8(2) could be applied only if article 10(1) was applicable to the beneficiary's bank. Second, article 10(2) contains time-limits for giving notices that are to be given only by the beneficiary's bank.

18. A textual argument against the general application of article 10 to the beneficiary's bank is that the term "execution" as defined in article 2(1) does not clearly include the actions to be taken by the beneficiary's bank, although, as pointed out in paragraph 43, the definition of "execution" is drafted in such a way as to indicate that the term also applies to the beneficiary's bank, without indicating in what way. More importantly, the general policy of the Model Law is that it does not affect the relationship between the beneficiary and the beneficiary's bank. That policy would seem to indicate that, contrary to what was said in paragraph 17, the time-limit for execution of the payment order in article 10(1) should not apply to the

beneficiary's bank. See in particular article 10(1 ter), discussed in paragraph 19, and article 9(1), which provides:

> "The beneficiary's bank is, upon acceptance of a payment order, obligated to place the funds at the disposal of the beneficiary, or otherwise to apply the credit, in accordance with the payment order and the law governing the relationship between the bank and the beneficiary".

19. Paragraph (1 ter), relative to the date as of when the receiving bank must execute for value, specifically does not apply to the beneficiary's bank. It can be presumed that the drafting group at the twenty-fourth session of the Commission, where paragraph (1 ter) was drafted, was of the opinion that it was not necessary to set out a rule in respect of the beneficiary's bank. Since paragraph (1 ter) does not apply to the beneficiary's bank, it would appear that paragraph (1 bis) should also not apply to the beneficiary's bank.

20. Since the question of the application of article 10 to the beneficiary's bank appears not to have been resolved, the Secretariat's proposed redraft of article 10(1) in paragraph 36 makes no change to the existing text in that respect. The Commission, however, may wish to consider each of the paragraphs in article 10 to determine whether it should or should not apply to the beneficiary's bank.

C. Interpretation of term "banking day"

21. The term "banking day" is used in articles 5(b)(i) and (ii), 6(3) and (4), 8(2) and (3) and 10(1), (1 bis) and (2) to indicate the day on which certain actions must be done. The term is not defined and there is no indication in the report of the twenty-fourth session, when it was decided to use the term, as to what days would be banking days (A/46/17, para. 203). It might be thought that a banking day would be a day on which the bank in question performed the type of action under consideration in the provision in question. Under such an interpretation, in a given State all banks might have the same banking days or banking days might differ from one bank to another or even in regard to different activities in the same bank. This interpretation would be in line with the terminology currently found in article 10(4) and (5), which refer to "the day the bank executes that type of payment order" or "performs that type of action" without using the term "banking day".

22. It is therefore suggested that the term "banking day" be defined as follows:

> "Banking day" means a day on which the bank performs the type of banking operation in question.

23. If the Commission adopts this definition of "banking day", the term might be used in article 10(4) and (5) as well. However, the suggested individualized definition of "banking day" might make the provision in paragraph (5) redundant.

D. Time for giving notice of rejection and consequences of failing to do so

1. Receiving bank other than the beneficiary's bank

24. Where the receiving bank never receives payment for the payment order and the bank neither accepts nor rejects the order, article 6(4) provides that the order ceases to have effect at the close of business on the fifth banking day following the end of the execution period, i.e., at the close of business on the sixth banking day after the banking day of receipt.

25. Article 6(3) provides that a receiving bank that receives payment for a payment order (prior to the end of the sixth banking day after the banking day of receipt) but does not accept the order pursuant to article 6(2)(a) to (d) is required to give notice of rejection no later than on the banking day following the end of the execution period. The expected operation of the provision is easiest to understand if it is assumed that the receiving bank receives the payment order and payment for it at the same time. According to article 2(k) the execution period ends on the last day on which it may be executed under article 10(1), "on the assumption that it is accepted on receipt", i.e., the execution period ends at the end of the banking day after the banking day of receipt. Therefore, the receiving bank would be required to give notice of rejection no later than the second banking day after the banking day of receipt. Having failed to give the required notice of rejection, the receiving bank is deemed to have accepted the payment order pursuant to article 6(2)(e) at that time, i.e., the end of the second banking day after the banking day of receipt. As noted above in paragraph 11, under article 10(1) the bank would be required to execute the order by the end of the first banking day after the banking day of receipt, i.e., the day prior to its deemed acceptance.

26. The appropriateness of the execution period and the time-limits for giving notice of rejection would seem to be particularly questionable where the receiving bank receives payment for the payment order subsequent to its receipt of the order. For example, if the payment was received on the third banking day following the banking day of receipt of the payment order, the payment order would still be effective.

27. If the bank promptly accepted the order by sending its own payment order to an appropriate intermediary bank or to the beneficiary's bank (article 6(2)(c)), i.e., by executing the order (article 2(1)), it would have done so on the third banking day after receipt of the payment order, two days after it was required to execute the payment order under article 10(1). Similarly, the receiving bank would already be in breach of its obligations as to time of execution under article 10(1) if it immediately accepted the payment order under article 6(2)(b) or (d). The problem does not arise when acceptance takes place under article 6(2)(a); the situation under article 6(2)(e) is discussed immediately below.

28. If the bank did not accept the payment order, it would be required to give notice of rejection no later than on the banking day following the end of the execution period. As noted above in paragraph 25, the notice of rejection

must be given not later than the second banking day after receipt of the payment order, i.e., the day prior to the receipt of the payment in the example given. Article 6(2)(e) further provides that the payment order is accepted when the time for giving notice of rejection has elapsed without notice having been given, i.e., the day prior to the receipt of the payment in the example given. Therefore, in the example given, not only would the time for execution under article 10(1) have expired, but the literal application of the current text would make the deemed acceptance retroactive.

29. It should be noted, however, that a separate rule exists in article 10(1 ter) in regard to the day as of which the receiving bank must give value when it has accepted a payment order by virtue of article 6(2)(e). See paragraph 36, below.

30. The Commission may wish to consider whether it regards these results to be appropriate and, if it does not, the changes in the Model Law it might wish to make.

2. Beneficiary's bank

31. Although, as indicated above in paragraph 17, it is unclear whether article 10(1) is intended to apply to the beneficiary's bank, the time-limit for giving a notice of rejection is the same for the beneficiary's bank under article 8(2) as it is for other receiving banks under article 6(3). Therefore, the discussion in paragraphs 25 and 26 is fully applicable to the time-limit for giving the notice of rejection by the beneficiary's bank under article 8(2) and to the "deemed acceptance" of the payment order under article 8(1)(h). The questions raised about the time-limit for execution by the beneficiary's bank would also be applicable if the time-limits for execution in article 10(1) apply to the beneficiary's bank.

E. Time as of when value must be given

32. As part of the decision to extend the normal execution period to the banking day following the day of receipt of the payment order, a new paragraph (1 bis) was added to article 10, which, subject to exceptions that will be considered below in paragraph 34, provides that:

> "If the receiving bank executes the payment order on the banking day after it is received, ... the receiving bank must execute for value as of the day of receipt."

33. Although it is apparent that the Commission wished to adopt a general policy that, in the normal case where a receiving bank accepts a payment order by executing the order, value must be given as of the banking day of receipt, the provision does not say so. By its terms the provision applies neither to the case where the payment order is executed on the day of receipt, nor to the case where the payment order is executed on the second day after receipt (for a proposed redraft see below, paragraph 36).

34. Article 10(1 bis) provides that it does not apply if the payment order contains a specific date when the payment order is to be executed or a specific date when the funds are to be placed at the disposal of the beneficiary. Presumably the receiving bank must give value as of the day the

receiving bank is required to execute the payment order under article 10(1)(a) or (b), and the proposed redraft of article 10(1 bis) in paragraph 36 so provides.

35. Article 10(1 ter), rather than article 10(1 bis), applies to a receiving bank that is not the beneficiary's bank when that bank has accepted the payment order under article 6(2)(e) by failing to give a required notice of rejection. In such a case the receiving bank must execute for value as of the date when it received payment, i.e., the day when its obligation to accept or reject the payment order began (except in the rare case when payment was made prior to receipt of the payment order by the receiving bank; compare also the possible retroactive acceptance of the payment order as described in paragraph 26). The provision appears to work properly, except for the situation in which payment is made before the payment order is received, for which case a minor amendment is proposed in paragraph 36. As noted above in paragraph 19, article 10(1 ter) does not apply to the beneficiary's bank, presumably because it was thought that the question falls outside the scope of the Model Law.

F. Proposed redrafted article 10(1), (1 bis) and (1 ter)

36. The following redraft of paragraphs (1), (1 bis) and (1 ter) of article 10 is suggested in accordance with the discussion above:

"Article 10

"(1) In principle, a receiving bank that is obligated to execute a payment order under article 7(2) [or article 9(1)] is obligated to do so on the banking day it is received. However, if it does not, it shall do so on the banking day after the payment order is received, unless

"(a) a different day is specified in the payment order or in a separate agreement between the sender and the receiving bank, in which case the payment order shall be executed on that date, or

"(b) the order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and execute it on that date.

"(1 bis) A receiving bank that is obligated to execute a payment order must execute for value as of the day of receipt, except when complying with subparagraph (a) or (b) of paragraph (1), in which case it must execute for value as of the first day of the execution period as so indicated, or when paragraph (1 ter) is applicable.

"(1 ter) A receiving bank that becomes obligated to execute a payment order by virtue of accepting the payment order under article 6(2)(e) must execute for value as of the later of the day on which the payment order is received and the day on which

"(a) where payment is to be made by debiting an account of the sender with the receiving bank, there are sufficient funds available in the account to pay for the payment order, or

"(b) where payment is to be made by other means, payment has been made."

II. OTHER MATTERS

A. Branches and separate offices of a bank

37. The Working Group at its eighteenth session decided that the definition of "bank" should no longer contain the statement that branches of a bank were considered to be separate banks but that consideration should be given in each of the substantive provisions as to whether branches should be treated as banks. Consequently, provisions to that effect are found in articles 1(3), 7(6), 10(6), 11(9) and 18(3).

38. It is suggested in A/CN.9/346, comment 43 to article 2, that the issue might arise in other provisions, such as articles 12 to 14. There is no provision in the Model Law that appears to the Secretariat to raise special policy issues that would suggest that a branch or separate office of a bank should not be considered to be a separate bank. Therefore, the Commission may wish to consider whether it would wish to have a general rule to that effect and delete the five separate provisions.

B. Definition of "credit transfer", article 2(a)

39. The first two sentences of the definition of "credit transfer" adopted by the Working Group and submitted to the Commission were:

> "'Credit transfer' means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order."

40. At the twenty-fourth session of the Commission, the first part of the first sentence was changed to read:

> "'Credit transfer' means one or more payment orders, beginning with the originator's payment order, ..."

41. The report of the twenty-fourth session indicates that the purpose of the change in the text was to contribute to a more precise definition and to meet the concern underlying a proposal to delete the second sentence of the definition (A/46/17, para. 28). It is submitted that the prior text was more accurate. A credit transfer consists of a number of operations, including the issue of payment orders and the payment for them. That sense is better reflected in the first sentence of the prior text than in the first sentence of the current text.

42. The Commission may also wish to consider whether the concerns expressed at the twenty-fourth session might not be better met by referring in the first sentence of the former definition as set forth in paragraph 39 to "the issue of the originator's payment order" and in the second sentence to "the issue of any payment order by the originator's bank or any intermediary bank intended to carry out the originator's payment order." Such a change might be considered to better reflect the words "series of operations" in the first sentence of the former definition.

C. Definition of "execution", article 2(1)

43. The definition of "execution" in article 2(1), which is in square brackets, refers only to the actions to be taken by a receiving bank other than the beneficiary's bank. However, the definition indicates that the term may apply also to a beneficiary's bank, without indicating in what way (for the discussion of this question at the twenty-fourth session, see A/46/17, paras. 75 to 81).

44. As regards a receiving bank other than the beneficiary's bank, a payment order is executed when "a payment order intended to carry out the payment order received by the receiving bank" is issued. Therefore, the payment order received would be "executed" even though an improper payment order was issued or a payment order was issued to an improper bank. That definition seems to come from article 6(2)(c), where the issue is whether the receiving bank has accepted the payment order received. However, in most provisions of the Model Law where the word "execute" or "execution" is used it is used in relation to the receiving bank's obligation under article 7(2). In that provision the receiving bank must issue a payment order that is consistent with the payment order received. Only in articles 15 and 16(8) is it clear that the payment order may have been improperly executed, and those two provisions speak of the consequences of such improper execution. The Commission may wish to consider whether a payment order should be considered to be "executed" when it does not carry out the payment order received, even though it was intended to do so.

D. Definition of "interest", article 2(n)

45. It has been suggested that the "banking community" to which reference is to be made to calculate the amount of interest owed may not be clear. That would not matter if interest rates for a given currency were the same in all markets. It may be doubted whether interest rates are the same in all markets for currencies that are not widely used in international trade and finance. It may also be questioned of currencies that are widely used in international trade and finance. If the Commission were to decide that the relevant banking community should be more specifically designated, it might choose between the banking community of the currency, the banking community of the defaulting bank and the banking community of the bank to which the interest will be paid.

E. Obligations of sender, article 4

1. Article 4(2)

46. Literally, "a mere comparison of signature" pursuant to article 4(2) would consist of nothing more than the comparison of the signature on the payment order with a sample in the possession of the receiving bank. Where the authentication procedure consisted of "a mere comparison of signature", the traditional rule would apply that the bank would be responsible for a false or fraudulent transfer. If the authentication required any other procedure, such as the showing of an identity or guarantee card to the bank employee, it would not be a mere comparison of signature. The Commission may wish to consider whether this interpretation of what is meant by a mere comparison of signature is correct and to adjust the text if that seems called for.

2. Article 4(3)

47. Article 4(3) does not appear to be drafted sufficiently clearly. It is suggested that it would more clearly state its purpose if formulated as follows:

> "The parties are not permitted to agree that a purported sender is bound under paragraph (2) if the authentication is not commercially reasonable in the circumstances."

3. Article 4(5)

48. In the report of the Secretariat to the twenty-fourth session of the Commission it was suggested that the word "error" should be understood to include all discrepancies between the payment order as it was intended and the payment order as it was received, whatever the source of the discrepancy (A/CN.9/346, comment 24 to article 4). The Commission took the view that "paragraph (5) covered errors in transmission of a payment order, and did not cover ... fraudulent alterations of a payment order by a third person" (A/46/17, para. 118).

49. The Commission may wish to further consider the Secretariat's suggestion. It would appear to the Secretariat that the issue in paragraph (5) is whether the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order and whether use of that procedure by the receiving bank would have revealed the erroneous duplicate or the error. It is understood that paragraph (5) will come into play only if the authentication procedure referred to in article 4(2) verifies only the source of a payment order but not its content. There is nothing in the procedure envisioned in paragraph (5) that depends upon the reason for the error or duplicate. It may have been a mistake on the part of the sender, a transmission error, or fraud by a third person. It is submitted that the criterion for application of paragraph (5) is the same in all cases, i.e., "use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate or the error".

50. Especially in the light of the interpretation given to paragraph (5) at the twenty-fourth session, it is suggested that the word "discrepancy" should be substituted for the word "error".

F. Payment to receiving bank, article 5

1. "For the purposes of this law"

51. While the opening words of article 5 were adopted by the Commission at the twenty-fourth session with a view to excluding application of article 5 to issues outside the Model Law itself, such as the insolvency of either the sender or the receiving bank (A/46/17, para. 124), it is difficult to see that they will have the desired result (see comments of Finland to the twenty-fourth session, A/CN.9/347, pp. 18-19). It might well be seen to be incongruous to apply article 5 to determine whether the sender had fulfilled its obligations to the receiving bank under the Model Law but not to apply

article 5 to determine whether the receiving bank had a claim against the sender in insolvency proceedings of the receiving bank.

2. Time when availability of credit leads to payment, article 5(b)(i) and (ii)

52. The concerns raised by Finland in its comments to the twenty-fourth session referred to in paragraph 49 related primarily to payment pursuant to article 5(b)(i) and (ii). The Commission may wish to consider a different approach to those problems. The reason why payment is not considered to be made to the receiving bank under article 5(b)(i) and (ii) until the receiving bank uses the credit or a period of time has passed after the receiving bank has learned of the credit is that the receiving bank should not be forced to accept credit at the sending bank or at the third bank, as the case may be, even if it has an account at that bank. If payment is final at the time the credit is entered to the account, the receiving bank would have no means to control its credit exposure to that bank. An alternative approach would be to consider the payment as having been made at the time the receiving bank's account was credited but to give the bank a period of time to reject the credit. It may be noted that the credit would, in any case, be rejected automatically if the receiving bank rejected the payment order under article 6(3) or 8(2) within the requisite period of time. If this approach were to be taken, it would have consequences for the various time-limits that arise out of the deemed acceptance rule.

53. If the Commission does not wish to follow the approach suggested above, it would appear to be necessary to re-examine the drafting of the current text. The two subparagraphs, which are identical in all pertinent respects, provide that payment is considered as having been made to a receiving bank "on the banking day following the day on which the credit is available for use and the receiving bank learns of that fact". In practical terms, that means that the relevant event is that the receiving bank has learned that the credit is available for use. Therefore, it must be assumed that the banking day in question is the banking day of the receiving bank. It must also be assumed that the payment is made to the receiving bank at the end of that banking day rather than at some time during the day. Otherwise there would be no fixed time when payment was made.

54. These questions were discussed by the Working Group at its twenty-second session without any firm conclusions having been reached (A/CN.9/344, paras. 72-80). If the Commission is in agreement with the conclusions of the Secretariat, the last clause of the two subparagraphs might be redrafted to read:

> "at the end of the banking day following the banking day on which the receiving bank learns that the credit is available for use."

3. Time when credit to an account is used, article 5(b)(i) and (ii)

55. In the same discussion the Working Group noted that in most cases the credit would not be withdrawn, i.e., "used", in specific terms, since the credit and any debit that might be considered to represent the withdrawal would be part of a continuous series of transactions through the account (A/CN.9/344, para. 71). That leaves a question as to how to determine whether

the receiving bank has used a specific credit. As article 5 is currently drafted, that determination would have to be made according to otherwise applicable law. The Commission may wish to consider adding a provision to state that credits to an account are considered to have been withdrawn in the order in which they were made to the account.

G. Revocation, article 11

1. Paragraphs (1) and (2)

56. It is suggested that the two paragraphs would read more easily if the last two words "if later" were deleted and the pertinent parts of the provisions were drafted as follows:

> " ... before the later of the actual time of execution and the beginning of the day on which ..."

and

> " ... before the later of the time the credit transfer is completed and the beginning of the day when ..."

2. Paragraph (6)

57. It is suggested that, for the sake of clarity, the words "to the previous sender" should be replaced by the words "to its sender".

H. Duty to assist, article 14

58. It should be recalled that the Commission at its twenty-fourth session "decided to postpone its final decision regarding the article until it had discussed the issues arising under articles 16(5) and 17" (A/46/17, para. 272).